

Extendicare Health Facilities, Inc., d/b/a Trevilla of Golden Valley and Minnesota Licensed Practical Nurse Association/Technical Employees Association of Minnesota, Petitioner. Case 18–RC–16297

April 28, 2000

DECISION ON REVIEW AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN
AND BRAME

On June 26, 1998, the Regional Director for Region 18 issued a Decision and Direction of Election in the above-entitled proceeding, in which he found that the Employer's licensed practical nurses (LPNs) are not supervisors within the meaning of Section 2(11) of the Act.

Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Employer filed a timely request for review of the Regional Director's decision. By Order dated September 21, 1998, the Board granted the Employer's request for review solely with respect to the Regional Director's finding that the Employer's LPNs do not possess supervisory authority with respect to their roles in the Employer's evaluation and disciplinary processes.¹ The election was conducted as scheduled on September 23, 1998, and the ballots were impounded.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having carefully reviewed the record,² we conclude, contrary to the Regional Director, that the Employer's LPNs are statutory supervisors. In so concluding, we find that the LPNs exercise independent judgment in completing evaluations of nursing assistants (NAs) on an annual basis, and that these evaluations are relied upon by the Employer to award specific merit increases.³ *Bayou Manor Health Center*, 311 NLRB 955 (1993).

The Employer operates a 225-bed nursing home in Golden Valley, Minnesota. The home's nursing department consists of a director of nursing (DON) (a position that is currently vacant) and 15-stipulated supervisors—an assistant director of nursing/quality assurance director (ADON), who is serving as the acting DON; a registered nurse (RN) staff coordinator; 4 program directors; 5 RN care coordinators (one of whom is also a program director); and 4 RN house supervisors. The nursing department also includes 18 to 20 staff RNs, 30 staff LPNs, and approximately 90 nurse aides (NAs).

Since at least December 1992, LPNs have been responsible for completing annual evaluations of each NA

on or about the NA's anniversary date. When an LPN is asked to evaluate an NA, he or she is provided with a form that contains performance criteria associated with numerical point values.⁴ Each LPN completes the evaluation according to the specifications found on the form and signs it. Generally, after completing the form, the LPN presents the evaluation to the NA and discusses it with him or her. The DON then receives a copy of the evaluation and applies a formula to determine the NA's merit pay increase, which ranges from 0 to 4 percent. A rating of 75 to 100 points is considered as an above acceptable level of performance; an NA who receives a score in this range is awarded a 4-percent increase in pay. The director of case management (DCM) testified that NAs who receive 50 to 74 points, an acceptable level of performance, are awarded a 3-percent increase in pay. The evaluation form describes ratings of below 50 points as below an acceptable level of performance, and an NA who receives a score below 30 points receives no increase and a new review in 30 days.⁵ Also, an NA who scores below an acceptable level rating in two categories in the evaluation receives no increase in pay.

In *Bayou Manor*, supra, the Board found that the employer's LPNs were statutory supervisors because the evaluations they completed directly affected the wages of the certified nursing assistants (CNAs). The Board in *Bayou Manor* found a direct correlation between the scores awarded by the LPNs and the merit increases or occasional departmental bonuses awarded to the CNAs. In a procedure similar to that used by the Employer here, the LPNs evaluated CNAs by assigning numerical scores from 1 to 10 to each of 16 items covering their work performance and personal characteristics, and an overall average score was computed. The employer's administrator allocated specific percentage increases corresponding to various averaged scores awarded. Thus, the scores that the CNAs received on their evaluations directly determined the amount of any merit increase that they were awarded.

As in *Bayou*, the LPNs here complete evaluations that have a direct linkage to the merit pay increases received by NAs, and issue them without the DON's prior approval and generally without any review by higher authority. Mandatory reviews occur only in limited circumstances where an evaluation would "put someone in a probationary period or termination situation" or where an NA invokes the Employer's "complaint resolution" procedure because he or she is dissatisfied with his or her score. Occasionally, an LPN will voluntarily seek input from his or her supervisor before completing an evaluation.

¹ Member Hurtgen, dissenting in part, would have granted the Employer's request for review in its entirety.

² No briefs on review were filed.

³ In view of our finding that LPNs are statutory supervisors based on their role in the Employer's wage determination process, we find it unnecessary to decide whether their roles in the Employer's probationary evaluation and disciplinary processes are also sufficient to establish their 2(11) status.

⁴ Fifteen points out of 100 are awarded for attendance and punctuality, and are not determined by LPNs.

⁵ It is unclear whether employees who receive 30–49 points receive an increase.

On such occasions, the evaluation process entails a collaborative effort on the part of an LPN with his or her supervisor to jointly determine the ratings issued to an NA. One LPN testified that when she discusses an evaluation with a supervisor, the supervisor would ask her “opinion” and then “sometimes” recommend the points to be awarded. Another LPN testified that she has issued evaluations without prior review by her supervisor. However, for a “low scoring evaluation,” she would go to her supervisor “and [sic] we were in agreement with it.” The Employer’s director of case management (DCM) testified that if an LPN “had some concerns [with an evaluation of a named individual] . . . we would read it together and looked at what the outcome was going to be.” The DCM also testified that if an NA contested his or her score, “I always went to the person who did the evaluation and discussed it with them. I do not unilaterally make changes,” and “we [the DCM and LPNs] always agreed. We came to an agreement.” The LPNs’ testimony conforms to that of the DCM’s. One LPN testified that a score she awarded was changed once, but not before the DON came to her “and we talked it over and I agreed so we did it.” Other LPNs testified that they never had a score modified. Only one or two evaluations have been changed as a result of this process, and no change resulted in a change in pay. The Board has found such “collaborative” efforts do not negate finding that individuals possess supervisory authority. See *Harbor City Volunteer Ambulance Squad*, 318 NLRB 764 (1995) (evaluators who composed employee evaluations in “collaboration” with supervisors were found to have exercised supervisory authority to affect employees’ pay).⁶

⁶ The fact that 8 of 27 evaluations in evidence contain changes in the scores, does not indicate that the LPNs lack the authority to determine pay increases through their evaluations. As shown above, an evaluation can reflect a collaborative effort on the part of LPNs and their supervisors to jointly arrive at a score. The evidence also indicates that changes in the scores awarded by LPNs could reflect changes made by the LPNs themselves after discussing the evaluations with the NAs. There is no testimony that any evaluation was changed without the evaluating LPN’s agreement.

Thus, contrary to the Regional Director, we find that the evaluations completed by the Employer’s LPNs directly determine the amount of any merit increase conferred on NAs.⁷ See *Cape Cod Nursing & Retirement Home*, 329 NLRB 233 (1999) (charge nurses found to be supervisors where they assigned individual ratings to nursing assistants, and the ratings were the sole basis for the overall rating on which specific percentage increases were awarded). As there is a direct correlation between the evaluations completed by LPNs and the merit increases awarded to the NAs evaluated, we conclude that the Employer’s LPNs are statutory supervisors within the meaning of Section 2(11) of the Act.⁸

ORDER

The Regional Director’s Decision is reversed with respect to his finding that LPNs are not statutory supervisors. This proceeding is remanded to the Regional Director for further appropriate action consistent with this Decision.

⁷ We further find that both LPNs and the NAs are aware that the number of points awarded by LPNs on NAs’ evaluations will affect the NAs’ pay. One LPN specifically testified that she knew her ratings impact on the raises awarded to NAs, and it is uncontested that during orientation new employees are informed that scores they received in their evaluations from LPNs will affect their wage increases.

⁸ According to the Regional Director, LPNs may refuse to, and some never, complete evaluations. However, record evidence shows that these LPNs were new to their positions and were not yet comfortable completing an evaluation on their own. There is no indication that any LPN employed by the Employer for a longer period of time has not completed evaluations as a matter of routine.